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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1967

GRACE D. GRAHAM

VS.

JAIME LUIS COLON

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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SUMMARY OF ARGUMENT

I

This is an automobile accident case which occurred in Indiana. The occupant has sued the driver upon the theory she was a fare paying passenger. Indiana has a "Guest Act". The substantive question below was, was petitioner exempted from this Act as a fare paying passenger.

Indiana cases interpreting the Indiana "Guest Act" have applied a social/business motivation test. The controlling criteria being the intent on the part of the driver to receive something more than reimbursement for the travel expenses.

This analysis in determining the status of a vehicle's occupant is followed even though there is a mutual arrangement for payment of the expenses. The District Court submitted the factual issue of "motivation" to the jury. The Court of Appeals affirmed this action.

Petitioner relies upon the opinions of the Supreme Court of Ohio and the Court of Appeals, 6th Circuit, in an effort to prove an alleged conflict in opinions between the Circuits. Since the case involves an accident occurring in Indiana and is controlled by Indiana law, the law of Ohio and the opinions of the 6th Circuit are of no moment

A conflict of Court of Appeals' opinions which is the result of applying the different substantive law of different states, is not a "conflict" within the intendment of Supreme Court Rule 19. Hence, there is no conflict to justify certiorari.

II

An important state question has not been erroneously decided. Indiana courts, in interpreting Indiana's "Guest Act", have followed an analysis which seeks to determine the motivations of the driver to determine the status of an occupant in the vehicle. This is true even though there is a prior mutual arrangement for sharing the expenses of the trip. Whether the agreement is to pay part, or all of the expenses, is merely one of the surrounding circumstances to consider in determining the social/business motivations of the host driver.

Indiana courts have rejected the "express contract" analysis adopted in Ohio and followed by the 6th Circuit when bound by Ohio law. The District Court permitted the jury to determine, under appropriate instructions, whether the arrangement for paying a part of the trip's expenses created a business as opposed to a social relationship. This was pursuant to Indiana cases which had dealt with such situations. The Court of Appeals affirmed this action of the trial court inasmuch as Indiana substantive law controlled -- not Ohio. Accordingly, an important state question has not been erroneously decided under applicable law.

REASONS FOR DENYING THE WRIT

I

No Conflict Between the Circuits

Unless the territorial jurisdiction of the Ohio Supreme Court has been expanded to

include the State of Indiana, there is no conflict of decisions existing between the Circuits.

This is a typical automobile accident case which occurred within the State of Indiana. Petitioner was an occupant in respondent's vehicle. She has sued the respondent upon a theory of negligent operation -- not the usual wilful or wanton misconduct theory generally followed in this type of case.

Indiana, like most states, has a statute regulating liability between a guest-occupant and a host-driver. This statute provides:

> "47-1021. Guest of owner or operator--Right to damages.--The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest, while being transported without payment therefor, in or upon such motor vehicle, resulting from the operation thereof, unless

such injuries or death are caused by the wanton or wilful misconduct of such operator, owner, or person responsible for the operation of such motor vehicle."

Indiana Acts 1937, Chapter 259, Sec. 1, p. 1229; Burns' Indiana Statutes Anno., Sec. 47-1021.

Under this statute, recovery is limited to those cases where wilful or wanton misconduct is present.

To circumvent this statute, petitioner has attempted to characterize her status in respondent's vehicle as that of a "fare paying passenger". To accomplish this, she has seized upon the term "express" contract in an effort to distinguish applicable Indiana case law. Accordingly, the controlling substantive question considered by both the District Court and Court of Appeals was, is petitioner exempted, under Indiana decisions, from the application of Indiana's "Guest Act". The issue, thus

presented, is the simple matter of interpreting an Indiana statute in light of the Indiana decisions construing that statute. There is no "Federal Question" or "Policy" remotely involved.

While not attempting to argue the substantive merits of the case, it is necessary to review applicable Indiana decisions in order to see the total absence of merit in petitioner's claim of conflict between the Circuits. The Indiana Supreme Court, in interpreting and applying Indiana's "Guest Act", stated:

> "The word 'guest' has more a social than a business significance. The words 'without payment for such transportation' imply some valuable consideration for the ride. The presence of the person injured must have directly compensated the owner or operator in a substantial and material way. If the trip is primarily social, incidental benefits though monetary, do not exclude the guest relationship. If the trip is primarily for business purposes and the one to be charged receives substantial benefit,

though not payment in a strict sense, the guest relationship does not exist. Expectation of a material gain rather than social companionship must have motivated the owner or operator in inviting or permitting the other person to ride. * * * Of primary importance are the motives actuating the parties."

Liberty Mutual Ins. Co. v. Stitzle, 220 Ind. 180, 185; 41 N.E.2d 133, 135 (1942). (Emphasis Added)

The same guidelines were again followed by the Indiana Supreme Court in Allison v. Ely. There the court said:

"The rules by which we must determine whether or not appellee-Ely has sustained the burden of proof on this question are well established in Indiana. * * * (Quoting from Liberty Mutual Insurance Co. v. Stitzle, (1942) 41 N.E.2d at page 135) The motives and purposes which actuate the transaction are of prime importance. * * * The motivating reasons for the invitation to ride determine the character of the passenger, and the purpose of the trip. * * * If the purpose of the trip is primarily for business as distinguished from pleasure or social, and the presence of the passenger in the motor vehicle directly compensates the owner or

operator thereof in a substantial and material way, then the guest relationship does not exist. * * * If the trip is primarily social or for pleasure as distinguished from business, incidental benefits, even the payment of money, do not exclude the guest relationship. * * * The word 'guest' has more 'social' than 'business' significance. * * * The motives which actuated both appellant and appellee herein were admittedly the saving of time necessary to travel to their homes from school, the elimination of the inconvenience of making the trip home by the public transportation then available; providing a way for appellant's sister, who was afflicted with mononucleosis, to go home for the Thanksgiving holiday without fighting the holiday traffic on public conveyances; and a saving in the expense by going in the automobile instead of by public transportation. * * * The motivating reasons for the trip clearly indicate more of a 'social' arrangement between parents whose sons were living in the same Fraternity House and attending the same school, than a 'business' purpose such as was the motivating reason for the trip in Liberty Mutual Insurance Company v. Stitzle, supra."

Allison v. Ely, 241 Ind. 248, 261; 170 N.E. 2d 371, 378 (1960).

This "motivation" analysis was again followed in the most recent reported Indiana decision. There, the Indiana Appellate Court stated:

> "This case contains a set of facts common to many lawsuits which involve the so-called guest law of Indiana. A group of people decide to take a car trip together and there is some mutual arrangement entered into concerning the payment of expenses. The case at bar is typical. One party drove the car -- another party bought the gas and paid for the lunch. There is nothing disputed or confusing in the record on this score. * * * The appellee reasons that this evidence is sufficient that she was being transported for pay. * * * Whether or not the kind of payment here alleged was such as was intended by the legislature in Section 47-1021, where it is said, 'While being transported without payment therefor, is a matter of law to be decided by the court * * * (citing and quoting from Liberty Mutual Insurance Company v. Stitzle, Allison v. Ely, Fuller v. Tucker, (1940) 103 P.2d 1086, Swinney v. Roler, (1943) 47 N.E.2d 846, Ott v. Perrin, (1945) 63 N.E.2d 163, Lee Brothers v. Jones, (1944), 54 N.E.2d 108). To exclude from the guest statute cases of this nature where groups of friends or relatives make arrangements to travel together,

> consideration must be given by the guest in excess of expenses incidental to the trip. There must be a clear intent on the part of the owner of the vehicle to receive something more than mere reimbursement for such expenses incurred. Little or no economic benefit accrued to appellant in this case. The case at bar does not meet this standard and is reversed."
>
> Knuckles v. Elliott, ___ Ind App. __, 227 N.E.2d 179, 180 (1967). Transfer Denied. (Emphasis Added)

The District Court, applying Indiana substantive law in a diversity case, correctly submitted to the jury the factual issue of "motivation". The Court of Appeals approved this by affirming the judgment and jury verdict.

Petitioner now contends that this has produced a conflict between the Circuits. Pointing to decisions of the Court of Appeals for the 6th Circuit which were governed by Ohio substantive law, petitioner now cries "conflict," and urges a great need.

for uniformity via certiorari. This is ridiculous.

Respondent does not quibble with petitioner's statement of Ohio law and the opinions of the 6th Circuit. However, respondent would point out to the Court that a conflict between Circuits which results from applying the substantive law of two different states is not such a conflict as is contemplated by Supreme Court Rule 19. In order to justify consideration for certiorari, Rule 19 requires that there be a conflict "on the same matter". A conflict between the substantive law of two states is not "the same matter" for each state has the unquestioned right to interpret its own statutes as it sees fit. In a case such as this, the words of Mr. Justice Reed are strikingly apropos:

> "As to questions controlled by state law, however, conflict among circuits is not of itself

a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts."

Ruhlen v. New York Life Ins. Co., 304 U.S. 202, 206; 58 S.Ct. 860, 861; 82 L.Ed. 1290, 1292 (1938). /

To the same effect is Cyclopedia of Federal Procedure, 2nd Edition, Vol. 11, Sec. 5400, p. 25.

For this reason, certiorari should not be granted upon the alleged ground that there is a conflict between the Circuits.

II

No Erroneous Decision of Important State Question

The Indiana authorities previously set out demonstrate that Indiana adheres to the social/business motivation test in determining the applicability of its "Guest Act". Whether there is a contract, express or implied, being only one of the surrounding facts from which the motivation of the host-driver is to be inferred.

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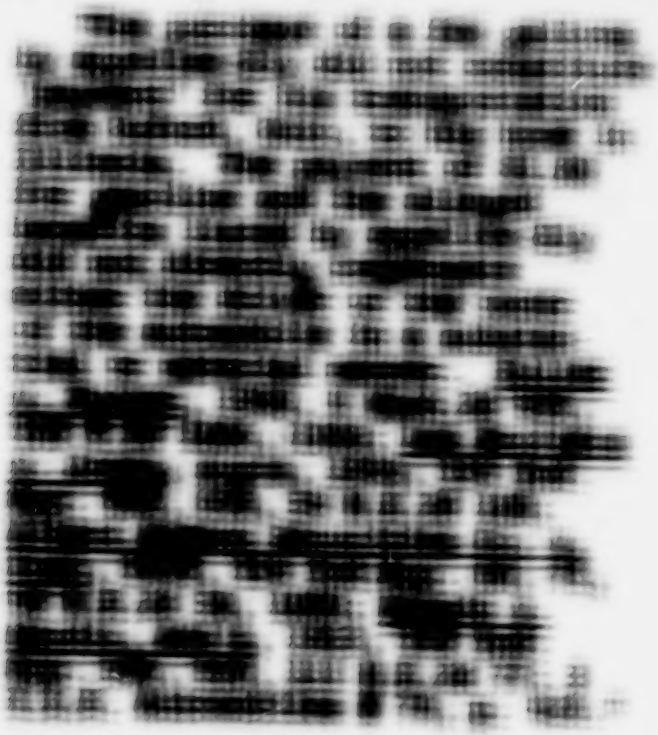

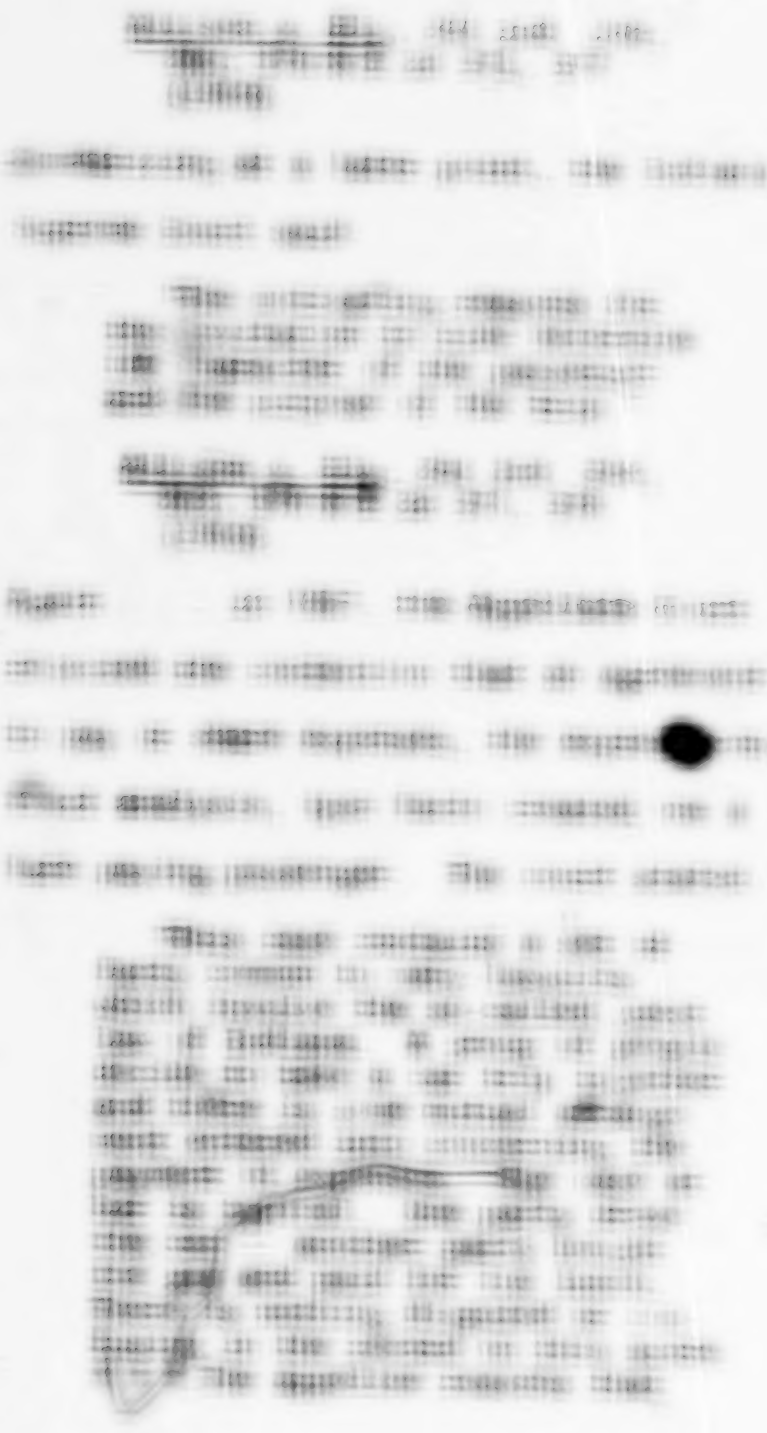

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